BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE MONTANA STATE AUDITOR

| IN THE MATTER OF |)) CASE NO. INS-2011-220 | |
|--|---------------------------------|--|
| DENNIS LYON, A.K.A. ROBERT JOE HANSON, | FINAL AGENCY DECISION AND ORDER | |
| Respondent. |))) | |

Pursuant to mailed notice, on Tuesday, June 12, 2012, at 9:00 a.m. at the Office of the Commissioner of Securities and Insurance, Montana State Auditor (CSI), a hearing was conducted by Hearing Examiner Michael J. Rieley (Hearing Examiner) in the above matter. The hearing was conducted pursuant to the hearing and appeals provisions of the Montana Insurance Code (Mont. Code Ann. § 33-1-101, et seq.) and the contested case provisions of the Montana Administrative Procedure Act (MAPA) (Mont. Code Ann. § 2-4-601, et seq.). Brett O'Neil, legal counsel for the CSI, represented the CSI at the contested case hearing. Neither Respondent nor counsel for Respondent was present.

At the contested case hearing, testimony was received on behalf of the CSI from Neil Brunett, a CSI insurance and securities investigator; Tim Morris, a CSI insurance examiner; and James "Jim" Bell. Bell is Manager of Fort Belknap Indian Community Construction, Inc., and of

Fort Belknap Tribal Construction, Inc., a District of Columbia corporation authorized to do business in Montana.

The following document copies were offered by the CSI, and without objection were received into evidence: Tim Morris' file (Exhibit 1); Montana Secretary of State Business Entity Search for Native American Funds Management Services (Exhibit 2); Nevada Secretary of State Business Entity Search for Native American Funds Management Services (Exhibit 3); National Association of Insurance Commissioners State Producer Licensing Report for Robert Hanson (Exhibit 4); Montana Secretary of State Certificate of Authority for Fort Belknap Tribal Construction, Inc. (Exhibit 5); January 13, 2010, Native American Funds Management Agreement (Exhibit 7); February 5, 2010, Fort Belknap Tribal Construction, Inc. Invoice #1072 (Exhibit 8); July 8, 2011, AIA document G702, Application and Certificate for Payment for F.B. College Work Force Center Phase 2 (Exhibit 9); September 30, 2010, Contract Change Order #2 for Workforce Training Center Part I Foundation and Site Work Project at Fort Belknap Agency, Montana (Exhibit 11); February 22, 2007, CSI Findings of Fact, Conclusions of Law, and Order in Case No. 2004-19 In the Matter of: Individual Surety LTD; Shonto Surety Inc.; and Robert Joe Hanson (Exhibit 12); and May 17, 2011, Montana Insurance and Securities Department Telephone Transcription between Neil Brunett and John Melk. (Exhibit 13). Proposed Exhibits 6 and 10 were not offered into evidence.

On August 28, 2012, the Hearing Examiner entered his Proposed Findings of Fact,
Conclusions of Law, and Order (Proposed Decision), and served the parties with the same. In
the Proposed Decision, the Hearing Examiner concluded that Respondent had engaged in
multiple violations of the Montana Insurance Code.

On September 10, 2012, the CSI issued a Notice of Opportunity to File Exceptions and Scheduling Order (Notice), which set a deadline of September 27, 2012, for the filing of exceptions, supporting briefs, and requests for oral argument. Respondent did not file exceptions, a supporting brief, or a request for oral argument within the prescribed time. The Notice also notified Respondent that if he did not file exceptions to the proposed decision within 30 days, it would constitute a waiver of his right to judicial review of this decision.

STANDARD OF REVIEW

In reviewing the Hearing Examiner's proposed decision, the Commissioner of Securities and Insurance, Montana State Auditor (Commissioner), is guided by the provisions of MAPA addressing contested cases. Mont. Code Ann. § 2-4-621. Specifically, MAPA provides:

The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

Mont. Code Ann. § 2-4-621(3)

As noted in *Ulrich v. State ex rel. Board of Funeral Services*:

When conducting a review of the Board's decision, we note that the Board, which did not personally hear or observe the evidence, does not have the authority to conduct a *de novo* review of the hearing examiner's decision. Rather, it may reject the examiner's findings only if they are not based upon competent, substantial evidence. Additionally, the Board must state with particularity that the findings are not based upon competent, substantial evidence . . . [omitting partial quote of Mont. Code Ann. § 2-4-621.]

A rejection of the hearing examiner's findings in violation of Mont. Code Ann. § 2-4-621(3) constitutes an abuse of discretion pursuant to § 2-4-704(2)(a)(vi)...

1998 MT 196, ¶ 14, 289 Mont. 407, 961 P.2d 126.

In interpreting MAPA, however, the Montana Supreme Court has held that a hearing examiner's findings of fact may be modified or rejected in other circumstances. See In the Matter of the Grievance of Brady, 1999 MT 153, 295 Mont. 75, 983 P.2d 292. The Commissioner may determine that certain of a hearing examiner's findings of fact are based on an interpretation of law and, therefore, such findings of fact may be rejected or modified like conclusions of law by the Commissioner. See id., ¶ 14.

With regard to a hearing examiner's conclusions of law interpreting and applying the Montana Insurance Code and rules promulgated thereunder, the Commissioner may determine that a hearing examiner misinterpreted the law and may modify or reject a hearing examiner's proposed conclusions of law. *See id.* Further, the Commissioner may accept or reduce the recommended penalty in a hearing examiner's proposed decision, but may not increase it without a review of the complete record. Mont. Code Ann. § 2-4-621(3).

So, therefore, after due consideration of the entire record in this matter including, but not limited to, the transcript of the hearing, and all exhibits admitted into evidence, the Commissioner makes the following determinations:

FINDINGS OF FACT

1. Respondent, Joe Lyon, a/k/a Dennis Robert Lyon, Dennis R. Lyon, and Robert Joe Hanson, operated as the Manager/Funds Administrator for Native American Funds Management Services, Inc. (NAFMS), having a represented address of 2510 E. Sunset #5, Suite #543, Las Vegas, NV, 89120. (Tr. 9, 25-26; Exhibit 7; Exhibit 13 at 5, 7-9, 14-16.)

- 2. CSI Insurance and Securities Investigator Neil Brunett (Brunett) testified NAFMS is not registered as a business entity with the Montana Secretary of State's Office or with the Nevada Secretary of State's Office. (Tr. 9-10.)
- 3. Respondent is not licensed to sell insurance products in Montana. (Exhibit 12 at 11.)
- 4. On February 22, 2007, the CSI ordered a Permanent Cease and Desist Order against Robert Joe Hanson and his companies. The CSI also fined Mr. Hanson \$90,000 and his companies a total of \$400,000 for 18 and 16 violations, respectively, of the Montana Insurance Code. (Tr. 20; Exhibit 12 at 28-29.)
- 5. James "Jim" Bell, a representative of Fort Belknap Tribal Construction
 Corporation, Inc. (Tribal Construction), testified that starting in 2008 or 2009, Respondent
 communicated with him regarding bonding for the Fort Belknap Indian Community. (Tr. 23-25.)
 In these communications, Respondent held himself out to be a bonding agent of NAFMS. (*Id.* at 23-25, 35, 38.)
- 6. Respondent and Tribal Construction entered into a bonding arrangement whereby NAFMS would provide surety on a construction project at the Fort Belknap College. (Exhibit 7; Tr. 24-25, 27.)
- 7. Tribal Construction is registered to transact business in Montana via a certificate of authority issued on November 26, 2003, by the Montana Secretary of State. (Exhibit 5; Tr. 40.)
- 8. On or about December 22, 2009, the Performance Bonds with Tribal Construction were finalized. (Tr. 29; Exhibit 8; Exhibit 11.) The total amount of the project was

- \$528,213.22. (Exhibit 11.) This was for Phase One of the contract. (Id.) Tribal Construction paid NAFMS \$29,660.66 for bonding costs and fees. (Tr. 27-29; Exhibit 8.)
- 9. On or about September 30, 2010, Tribal Construction submitted an amended contract for Phase Two of the project to NAFMS, using OIC Marianas Insurance Corp. (OIC) as an intermediary, totaling \$2,276,465.00. (Exhibit 11; Tr. 33-39.) NAFMS received \$118,376.19 from Tribal Construction for bonding costs and fees. (Tr. 31, 39.)
- 10. Respondent used a false name when signing the Native American Funds

 Management Agreement, a document related to the bond. (Exhibit 7; Tr. 26.)
- 11. Although Tribal Construction paid \$118,376.19 for bonding costs and fees,
 Respondent failed to provide legitimate bonding. (Tr. 41.)
- 12. OIC is not licensed to provide insurance products in Montana. (Tr. 13, 17-18; Exhibit 1.)
- 13. OIC has not reported any business to the National Association of Insurance Commissioners (NAIC). (Tr. 18.)
- 14. Respondent used OIC as an intermediary to transact business with Tribal Construction. (Exhibit 11; Tr. 33-39).
- 15. Respondent held himself out to James Bell as being an agent and/or representative of OIC. (Exhibit 11; Tr. 35, 38.)
- 16. James Bell relied on the "legitimacy" of NAFMS and Respondent in making
 Tribal Construction's bonding arrangement. (Tr. 40-42.)

From the foregoing findings of fact, the Commissioner makes the following proposed:

CONCLUSIONS OF LAW

- 1. The proper analysis in both regulatory and adjudicatory actions involving tribal members or lands is to ask whether the exercise of jurisdiction by a state court or regulatory body is preempted by federal law or, if not, whether it infringes on tribal self-government. Moreover, because the barriers are independent of one another, if either one is met, a state may not assume civil jurisdiction or take regulatory action over Indian people or their territories within the boundaries of their reservations. *In Re Estate of Big Spring*, 2011 MT 109, ¶ 46, 360 Mont. 370, 255 P.3d 121; *First v. State ex rel. Laroche* (1991), 247 Mont. 465, 470, 808 P.2d 467, 470; *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136, 141 (1980).
- 2. The federal Miller Act, 40 U.S.C. §§ 270a, et seq., requires the contractor for a federal construction project to furnish a payment bond of a statutorily specified amount to secure payment for suppliers of labor and material and does not exempt sureties from state regulatory laws. See K-W Industries v. National Sur. Corp., 855 F.2d 640, 642-43 (9th Cir. 1988).
- 3. The federal Miller Act does not preempt the state of Montana from regulating surety bonds on federal construction projects located on tribal lands. *See id*.
- 4. The undersigned has not been made aware of any provision(s) in the Fort Belknap Indian Community's Tribal Code concerning the registration of insurance producers or insurance fraud. In fact, Tribal Construction averred and availed itself to the State of Montana by registering with the Secretary of State. As a result, the undersigned concludes that there exists no legal infringement of the tribe's sovereign powers that would prohibit the State of Montana from assuming civil jurisdiction or the Commissioner from taking regulatory action regarding this matter.

- 5. The Commissioner has jurisdiction over this matter pursuant to Mont. Code Ann. §§ 2-15-1903 and 33-1-311.
- 6. Mont. Code Ann. § 33-1-311 requires the Commissioner to enforce the applicable provisions of the insurance laws of this state. Under Mont. Code Ann. § 33-1-311(3), the Commissioner has a duty to "ensure that the interests of consumers are protected" and under Mont. Code Ann. § 33-1-311(2), has authority as may be reasonably implied by the provisions of the Montana Insurance Code. Under Mont. Code Ann. § 33-1-311(4), the Commissioner has the additional duty of conducting investigations and examinations of insurance matters to determine whether any person has violated any provisions of the laws of this state.
- 7. Pursuant to Mont. Code Ann. § 33-1-202(3) a "Person" includes an individual, insurer, company, association, organization, partnership, business trust, corporation, or any other legal entity.
 - 8. Respondent is a "Person" as defined by Mont. Code Ann. § 33-1-202(3).
- 9. A "corporation," including one registered with the Montana Secretary of State such as Tribal Construction, also is a "Person" as defined by Mont. Code Ann. § 33-1-202(3).
- 10. "Insurance" is a contract through which one undertakes to indemnify another or pay or provide a specified or determinable amount or benefit upon determinable contingencies.

 Mont. Code Ann. § 33-1-201(5)(a).
- 11. An "insurer" includes every person engaged as an indemnitor, surety, or contractor in the business of entering contracts of insurance. Mont. Code Ann. § 33-1-201(6).
- 12. With respect to insurance, "transact" means to solicit, negotiate, sell, or effectuate a contract of insurance or transact matters subsequent to effectuation of the contract of insurance and arising out of it. Mont Code Ann. § 33-1-201(9).

- 13. An "unauthorized insurer" is an insurer not authorized by a certificate of authority issued by the Commissioner to transact insurance in Montana. Mont. Code Ann. § 33-1-201(10).
- 14. A person may not sell, solicit, or negotiate insurance or act as an insurance producer in Montana unless licensed as an insurance producer under the Montana Insurance Code. Mont. Code Ann. §§ 33-1-101 and 33-17-201(1).
- 15. Respondent acted as an insurance producer without being licensed under the Montana Insurance Code when he sold surety bonds to a Montana corporation. Mont. Code Ann. § 33-17-201.
- 16. "Surety insurance" includes insurance guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings, and contracts of suretyship. Mont. Code Ann. § 33-1-211(2).
- 17. By soliciting, negotiating, selling, and/or effectuating a contract of insurance for the sale of surety bonds to Tribal Construction, a Montana resident corporation, Respondent transacted insurance business in Montana without having a subsisting certificate of authority issued by the Commissioner as required by the Montana Insurance Code. Mont. Code Ann. § 33-2-101(1).
- 18. Respondent was not legally able to solicit, negotiate, sell, and/or effectuate a contract of insurance for the sale of surety bonds to Tribal Construction or otherwise transact insurance business in Montana due to the existence of a February 22, 2007, Permanent Cease and Desist Order issued by the Commissioner in Case No. 2004-19 against him as one of the Respondents in *In the Matter of: Individual Surety, Ltd. a/k/a Individual Surety; Shonto Surety, Inc.; and Robert Joe Hanson.*

- 19. Respondent committed insurance fraud by accepting premium money knowing that coverage would not be provided. Mont. Code Ann. § 33-1-1202(4).
- 20. An agent is one who represents another in dealings with third persons. Mont. Code Ann. § 28-10-101.
- 21. At all times material hereto, Respondent was the agent of NAFMS and acting within the scope of that agency relationship via either actual or ostensible authority exhibited by his actions to and communications with Tribal Construction. Mont. Code Ann. §§ 28-10-401-403.
- 22. Respondent assumed to act as an agent of NAFMS and by doing so warranted to Tribal Construction that he had the authority to solicit, negotiate, sell, and/or effectuate a contract of insurance for the sale of surety bonds to Tribal Construction. Mont. Code Ann. § 28-10-701.
- 23. An individual may be held personally responsible for the acts of a corporate entity if:
 - A. The individual was the alter ego, instrumentality, or agent of the corporate entity, and
 - B. The corporation was used as a "subterfuge to defeat public convenience, justify wrong, or perpetrate fraud."

Peschel Family Trust v. Colonna, 2003 MT 219, ¶ 24, 317 Mont. 127, 75 P.3d 793.

- 24. At all times material hereto, Respondent was the alter ego, instrumentality, and/or agent of NAFMS.
- 25. Respondent used subterfuge by signing false names to NAFMS documents, representing to Tribal Construction that NAFMS would provide bonding that it could not legally

provide, and by not disclosing that he had imposed against him a permanent cease and desist order permanently prohibiting him from soliciting, negotiating, selling, and/or effectuating a contract of insurance for the sale of surety bonds or otherwise transacting insurance business in Montana.

- 26. For all purposes relevant to this case, and based on the testimony received, Respondent Lyon was NAFMS.
- 27. By assuming to act and actually acting as the agent of NAFMS, Respondent is responsible to third persons for his acts of soliciting, negotiating, selling, and/or effectuating a contract of insurance for the sale of surety bonds and thereby transacting insurance business in Montana since his acts in doing so were illegal. Mont. Code Ann. § 28-10-702.
- 28. A violation of a Permanent Cease and Desist Order is subject to additional fines and penalties. Mont. Code Ann. § 33-1-318(3).
- 29. Respondent violated the terms of the Permanent Cease and Desist Order by committing the above-referenced violations of the Montana Insurance Code.

From the foregoing Findings of Fact and Conclusions of Law, the Commissioner issues the following:

ORDER

- 1. The penalties proposed by the CSI for Respondent's violations of the Montana Insurance Code are hereby approved and accepted.
- 2. In accordance with Mont. Code Ann. § 33-1-317, Respondent Dennis Lyon shall pay a fine of \$5,000 for each of three violations of the Montana Insurance Code, for a total of \$15,000. These violations include transacting insurance business in Montana without having a subsisting certificate of authority issued by the Commissioner; selling, soliciting, and/or

negotiating insurance without being licensed as an insurance producer in Montana; and insurance fraud.

- 3. In accordance with Mont. Code Ann. § 33-1-318(3), Respondent Dennis Lyon also shall pay a fine of \$5,000 for violating the terms of the Commissioner's Permanent Cease and Desist Order.
- 4. In accordance with Mont. Code Ann. § 33-1-1211(3), Respondent Dennis Lyon shall pay restitution to Fort Belknap Tribal Construction, Inc., a total of \$148,036.85 within 30 days of this Order. A copy of this payment shall be sent to the CSI c/o Lisa Monroe, legal assistant, 840 Helena Ave., Helena, MT 59601.
- 5. In accordance with Mont. Code Ann. § 33-1-1211(1)(b), Respondent Dennis
 Lyon shall pay any and all costs related to this proceeding within 30 days of this Order. These
 costs shall include the hourly rate for the Hearing Examiner, as well as expenses which include
 the hourly rate for the Hearing Examiner's paralegal time, fees, copies, and postage. The
 Commissioner takes notice of the costs totaling \$2,524.48 that are identified in Exhibit A.
 - 6. All fines levied in this Order are due within 30 days of the date of this Order.
- 7. For failure to file exceptions to the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law within 30 days of the same, Respondent has failed to exhaust his administrative remedies, and forfeited his right to judicial review of this Final Agency Decision and Order pursuant to Mont. Code Ann. § 2-4-702.

DATED this 23rd day of October, 2012.

MONICA J. LINDEEN

Commissioner of Securities and Insurance

Montana State Auditor

CERTIFICATE OF SERVICE

I hereby certify that on the <u>13</u> day of October, 2012, I served a true and accurate copy of the foregoing Final Agency Decision and Order upon all parties of record by mailing or hand delivering a copy thereof to:

Dennis Lyon 8210 39th New Town, ND 58763

Brett O'Neil
Special Assistant Attorney General
Office of the Commissioner of Securities and
Insurance, Montana State Auditor
840 Helena Ave.
Helena, MT 59601



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Gwendolyn A. Vashro, PP, CLA, PLS Paralegal

October 22, 2012

State Auditor's Office 840 Helena Avenue Helena, MT 59604

Re: Case No. INS-2011-220

In The Matter of Dennis Lyon, a/k/a Robert Joe Hanson

STATEMENT

PROFESSIONAL SERVICES RENDERED

April 2012

Draft order setting scheduling conference; serve same; MJR .50 hour

May 2012

- Review file in preparation for scheduling conference; hold scheduling conference; draft Notice of Hearing; serve same on parties;

 MJR 1.40 hours
- Receive and review Department's exhibit list;
 MJR .10 hour

June 2012

5 Receive and review Respondent's response and request for continuance and exhibit list; receive

Exhibit A

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| | and review Department's response to same; draft and serve order regarding same; MJR 1.50 hours | | | |
|-------------|---|--|--|--|
| 11 | Receive and review Respondent's second request for continuance; MJR .40 hour | | | |
| 12 | Attend hearing and related preparation; MJR 3.40 hours | | | |
| 18 | Receive and file hearing transcript; MJR .10 hour | | | |
| July 2012 | | | | |
| 20 | Receive and review Department's proposed findings; MJR .10 hour | | | |
| August 2012 | | | | |
| 12 | Review transcript and Department's proposed findings; begin drafting findings and conclusions; MJR 3.40 hours | | | |
| 14 | Continue drafting findings and conclusions; MJR 2.00 hours | | | |
| 15 | Continue drafting findings and conclusions; MJR 2.50 hours | | | |
| 16 | Continue drafting findings and conclusions; MJR 3.60 hours | | | |
| 21 | Continue drafting findings and conclusions; MJR 4.80 hours | | | |
| 22 | Continue drafting findings and conclusions; related legal research; | | | |

MJR 5.80 hours

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| 23 | Conduct exhibit review; finish drafting propfindings and conclusions; MJR 3.30 hours | osed |
|--------|--|------------------|
| 28 | Finalize proposed findings and conclusions; serve same. MJR 1.70 hours | |
| TOTAL | PROFESSIONAL SERVICES 34.60 hours | \$2,422.00 |
| | | |
| DISBUI | RSEMENTS | |
| Octobe | er 2012 | |
| 2 | State Law Library of Montana (copy attached) \$ 5.60 | |
| 22 | Paralegal expense (itemization attached) \$ -0- | |
| 22 | Admin. Costs @ 4% (telephone, photocopies, postage, and fax) \$96.88 | |
| TOTAL | DISBURSEMENTS | <u>\$ 102.48</u> |
| | TOTAL FEES AND DISBURSEMENTS | \$2,524.48 |
| | | ====== |
| | Thank You | |

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July 1, 2012 - September 28, 2012

Agency/Firm Name

| _56_ | Pages copied on account no. (0.10 per page) | \$ 5.69 |
|------|--|---------|
| | Pages copied and signed for (0.10 per page) See attached pg(s). | \$ |

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